GANA MUTHUSAMY

v.

TETUAN LM ONG & CO

HIGH COURT MALAYA, JOHOR BAHRU
MOHD GHAZALI J
RAUS SHARIF J
ABDUL KADIR MUSA J
[CIVIL APPEAL NO: 12-36 OF 1992]
1 OCTOBER 1997

LEGAL PROFESSION: *Professional discipline - Professional conduct - Issuance of receipt for mesne profits for monies paid as rentals - Refusal to remedy situation - Whether tantamount to conduct unbefitting a solicitor - Order of censure by Disciplinary Committee - Whether proper - Legal Profession Act 1976, ss. 95, 99, 100(1), 101*

While acting as solicitor for the plaintiff in a pending tenancy suit, the appellant accepted a sum of RM520 from the defendant's solicitor, the respondent herein. In tendering the RM520 to the appellant, the respondent made it very clear that the sum was for payment of rental for the demised premises for the months of April and May 1989. The appellant apparently had instructions from the plaintiff to accept the sum as mesne profits, and so, received the said moneys as such and issued a receipt to the respondent acknowledging acceptance of mesne profits of RM520. The respondent objected to the receipt, and urged that the appellant either accept the sum as rental or return the monies to them. The appellant refused to do any of these. The respondent lodged a complaint to the Bar Council under s. 95 of the Legal Profession Act 1976 ('LPA'), and pursuant to that, the learned Chief Justice, Malaya appointed a Disciplinary Committee ('DC') to inquire into the complaint. The DC took the view that the appellant, by appropriating the RM520 as mesne profits, had committed a breach unbecoming of a solicitor, and in the circumstances, ordered that the appellant be censured. The appellant has since appealed.

Held:
Per Mohd Ghazali J

[1] The respondent's letter to the appellant clearly stated that the sum of RM520 was tendered for payment of rental for the said premises for the months of April and May 1989. The appellant however chose to issue a receipt for mesne profits although the suit in the Sessions Court was still pending then, which would denote that the question as to whether the defendant has to pay mesne profits has not been determined as yet.

[2] Whether the appellant was legally entitled to treat the said sum paid as mesne profits has no bearing upon the matter before this court. What is important is that the respondent intimated in their letter that they were tendering the rental due for the months of April and May 1989. That being so, it was not open for the appellant, in his capacity as solicitor for the plaintiff, to say that he is receiving the said sum as mesne profits upon instructions. To treat the payment unilaterally as mesne profits and issuing a receipt for the same cannot amount to fair conduct in relation to another solicitor.

[3] We cannot see how a solicitor upon receipt of monies from another solicitor for a specific purpose can upon receiving client's instruction issue a receipt for another purpose. The appellant therefore cannot 'escape liability' merely on the ground that it was done upon the client's instructions.

[3a] In any case, since the said sum of RM520 was towards payment of rentals due and not for mesne profits, it would be the appellant's duty to explain adequately to the client the purpose that the money was paid for. There is nothing to show that he had done so.

[4] Mesne profits are in the nature of damages for the tort of trespass. In this case, since the issue as to whether the plaintiff is entitled to such damages has yet to be determined by the court when the receipt was issued, we cannot see how s. 28(4) of the Civil Law Act 1956 can assist the appellant at this stage.

[5] An advocate and solicitor is under a professional obligation to observe the standard of conduct required of members of his profession. The appellant, by appropriating the said sum as mesne profits and issuing a receipt for the same when it was tendered as payment for rental, and by subsequently refusing to remedy the situation, was guilty of conduct unbefitting a solicitor.

[Appeal dismissed.]

Cases referred to:
Au Kong Weng v. Bar Committee State of Pahang [1980] 2 MLJ 89 ***(refd)***
Keith Sellar v. Lee Kwang, Tennakoon v. Lee Kwang [1980] 2 MLJ 191 ***(cit)***
Skaife v. Jackson [1824] 3 B & C 421 ***(refd)***
Tennakoon v. Lee Kwang [1980] 2 MLJ 191 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28(4)(a)
Legal Profession Act 1976, ss. 95, 99, 100(1), 101
Rules of the High Court 1980, O. 55 r. 13

Other sources referred to:
Concise Oxford Dictionary, 9th edn
Guide to the Professional Conduct of Solicitors, Council of the Law Society, 1974
Jowitt's Dictionary of English Law, vol 2
Rent Control in Malaysia, RR Sethu, 1986 edn, pp 230-233

Plaintiff in person
For the respondent - Serene Ong; M/s LM Ong & Co

Reported by Rusnah Abd Aziz

JUDGMENT

Mohd Ghazali J:

The appellant in this matter has appealed to this court against the decision of the Disciplinary Committee ('DC') – appointed by the Chief Justice, Malaya (as the Chief Judge, Malaya was then known) on 26 February 1990 under the then s. 99 of the Legal Profession Act 1976 ('LPA') – wherein it was ordered that he be censured.

The background to the matter is as follows:

By a letter dated 4 December 1989, the respondent in this matter, L.M. Ong & Co, Johor Bahru, a firm of advocates and solicitors, made a complaint against the legal firm of Gana Muthusamy & Co, Johor Bahru to the Bar Council pursuant to the then s. 95 of the LPA. The gist of the complaint was that Gana Muthusamy & Co had appropriated a sum of $520 for mesne profits and had issued a receipt for the same, when it was tendered as payment for rental and their subsequent refusal to remedy the situation despite several requests by the respondent.

The statement of complaint by the respondent is as follows:

(a) The appellant acted for one Sharifah Zainah bte Hassan Alattas who was the plaintiff in Johor Bahru Sessions Summons No. 52-29 of 1989 and the respondent acted for the defendant, one Heng Ee Fong (hereinafter referred to as the "plaintiff" and "defendant" throughout, respectively).

(b) The action is basically a landlord and tenant action in which the claim of the plaintiff against the defendant is for, *inter alia,* vacant possession of a certain rent-controlled premises which the defendant is alleged to have failed and/or refused to pay the plaintiff the monthly rent of $500 for. There is also a claim for mesne profits.

(c) The defence of the defendant is basically that of tender of the actual monthly rental of $280 which the plaintiff is alleged to have had continually rejected.

(d) Whilst the action was still pending, the respondent had by their letter to the appellant dated 30 March 1989 tendered the defendant's cheque for $520 for payment of the rental for the said premises for the months of April and May 1989.

(e) The appellant paid in the said cheque but issued their receipt dated 7 April 1989 describing the said payment as "mesne profits on account of JB. M/CT. S/No. 52-29/89" instead of rental for the said premises for April and May 1989 which it was supposed to be and had been tendered as. This receipt was forwarded to the respondent under cover of the letter of the appellant's firm dated 18 April 1989.

(f) There is no order in the Sessions Court matter or in any other action for the payment by the defendant to the plaintiff of any mesne profits or any monies whatsoever.

(g) Nothwithstanding the numerous demands of the respondent on the appellant's firm to amend their said receipt to correctly describe the said payment as the rental aforesaid or failing which to refund the said payment to the defendant, it being his cheque, the appellant's firm had failed and/ or refused to do so.

The DC found that the respondent did in fact send the said sum of $520 for purposes of rental whereas the appellant appropriated the sum for mesne profits and issued a receipt for the same. The DC noted that the respondent had on four (4) previous occasions forwarded the said sum as rentals and the appellant's firm has returned the same on each occasion.

On the whole, the DC found that the appellant "has by appropriating the sum of $520 for a purpose other than that it has been tendered for has committed a breach unbecoming of a Solicitor but such breach not deriving out of dishonesty does not warrant serious convictions" and consequently made the following order:

> Accordingly, pursuant to Section 101 of the Legal Profession Act, 1976 the Disciplinary Committee hereby orders that:-
>
> (a) the Respondent be censured;
>
> (b) there be no order as to costs.,

and hence this appeal.

At the outset of the hearing of this appeal, the appellant conceded that he was procedurally wrong as his appeal should have been made by motion in accordance with O. 55 r. 13 of the Rules of the High Court 1980 and not by way of a notice of appeal followed by a memorandum of appeal. Since counsel for the respondent did not raise any objection and furthermore, as we were unanimously of the view that the mode of appeal was not a nullity but a mere irregularity, we requested the appellant to go into the merits of his appeal.

The appellant then submitted that the only issue is whether he was wrong in acting the way he did. He pointed out that the plaintiff's notice to quit against the defendant had already been issued and that being so, they took the view that if payments were received as rental, it may amount to waiver. He however conceded that he had earlier rejected four (4) payments for rental sent by the defendant. Subsequently on receiving instructions from his client, he advised her to accept the said sum of RM520 as mesne profits. In support of his contention that the plaintiff could do so, he referred to s. 28(4)(a) of the Civil Law Act 1956 which reads:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

To support his stand, the appellant also referred to a book entitled *"Rent Control in Malaysia"* by R.R. Sethu (1986 Edn) (pp. 230 - 233) where the learned writer, when discussing the topic of waiver under a sub-topic entitled "Acceptance without prejudice" and in discussing a question posed by his goodself at the outset, namely, "is it effective to prevent a waiver if rent is demanded and/or accepted 'without prejudice'?", said (at p. 232):

> The safest way to avoid a waiver seems to be not to accept rentals or not to demand or accept payments as rent. There does not seem to be any harm in accepting payments as 'mesne profits for use and occupation' or such expression. Mesne profits is inconsistent with the existence of a tenancy but is consistent with wrongful occupation of premises. Mesne profits are essentially damages in tort for trespass.

Based upon the above, the appellant submitted that the finding of the DC is not proper, invalid and not in accordance with the law.

In her submission, counsel for the respondent pointed out that there is no allegation of dishonesty in their complaint. The only stand that they are taking is simply that it is not proper for a solicitor to issue a receipt for mesne profits when the payment has been tendered for rentals due. She also added that she was only concerned from the practice point of view and not the order of censure or even costs.

We have, on 19 July 1997, dismissed the appeal and we now give our reasons. It is not disputed that the respondent by their letter dated 30 March 1989 tendered the defendant's cheque for $520 for payment of the rental for the said premises of April and May 1989 to the appellant. That letter read:

> Dear Sirs,
>
> Re: **Premises No. 132, Jalan Trus, J.B.**
>
> We refer to the above matter.
>
> We enclose herein our client's cheque Pacific Bank No. 587107 for the sum of of $520-00 being rental for the abovementioned premises for the months of April, 1989 and May, 1989 for your onward transmission of the same to your client.
>
> Kindly acknowledge receipt and let us have your official receipt for the same.

It is also not disputed that the appellant consequently issued the following receipt:

> GANA MUTHUSAMY & CO
> Room 504, 5th Floor
> Wisma Peladang
> (next to Malayan Banking)
> Jalan Selat Tebrau
> 80000 Johor Bahru, Johor
> Tel: 07-242787
>
> File No. GM/TEN 8/88 OFFICIAL RECEIPT No. 0168
>
> CLIENT'S A/C Date: 7.4.89
>
> RECEIVED from M/S L. M. ONG & CO the sum of Dollars FIVE HUNDRED TWENTY ONLY being mesne profits on Account of JB M/Ct S/No. 52-29/89.
>
> $520-00 (sign.)
>
> Cheque No. 587107 (PBB) M/S GANA MUTHUSAMY & CO.

The appellant's covering letter dated 18 April 1989 enclosing the above receipt read:

> Dear Sir,
>
> Re: **Premises No. 132 Jalan Trus, Johor Bahru**
>
> We refer to the above matter and enclose herewith the following documents for your perusal and retention:

(a) Official receipt for the payment of $520/- being mesne profits on account of the above premises.

(b)

(c)

Kindly acknowledge receipt.

It was the stand of the respondent in subsequent correspondence which ensued that the said sum of $520 was tendered as rental for the months of April and May 1989 and not as mesne profits on account of the suit pending in the Sessions Court and as such, insisted that the appellant may either accept the payment as rental and issue a receipt for the same or reject the payment by returning the cheque. It was also stressed in their letters that the appellant cannot accept the said payment as something that was not tendered to them as and the respondent accordingly returned the said receipt for it to be amended or cancelled in which event the refund of the said sum.

In his reply dated 21 June 1989 the appellant, *inter alia,* stated:

> Your letter dated 30th March 1989 failed to state specifically the condition upon which the sum of $520 is being forwarded and your client may advance it as rental but there is no rule to prevent our client from treating it as payment on account of mesne profit. Even if you had imposed a condition our client is still entitled to treat the monies paid as mesne profit. Accordingly we return herewith our official receipt for the said sum.

The respondent's response dated 9 July 1989 was, *inter alia,* as follows:

> Your client merely received the said sum of $520 from you which you had chosen to describe as mesne profits. Our complaint is therefore against you as a member of the Bar. The pertinent question is whether you as a member of the Bar can accept monies as something, other than what is was tendered to you. Our opinion is that you clearly cannot and that if you are not prepared to accept monies for the purpose that it was tendered to you then you should return the same. We strongly recommend that you should take advice on this matter as we will refer this matter to the Johor Bar Committee if you do not either refund us the said sum of $520 or amend your receipt No. 0618 accordingly. We enclose herein your said receipt for your amendment.

By letter dated 14 July 1989 the appellant, *inter alia,* stated:

> The cheque for the sum of $520 forwarded by you to us on behalf of our client alleged as rental for April and May 1989 was paid into our client's account based on specific intructions of our client. The issue of the said receipt is also based upon the said instructions. To say therefore we have a personal role in this matter justifying disciplinary intervention reflects a lack of proper appreciation on your part between Solicitor-client relationship and the principles of agency in so far as they are applicable to the said relationship.

The facts are clear. The respondent's letter to the appellant clearly in no uncertain terms stated that the sum of RM520 was tendered for payment of rental for the said premises for the months of April and May 1989. The appellant however chose to issue a receipt for mesne profits although the suit in the Sessions Court was still pending then which would denote that the question as to whether the defendant has to pay mesne profits has not been determined as yet. Nothwithstanding that, the appellant chose to receive the sum as mesne profits in respect of that suit. In the subsequent exchange of letters the respondent intimated that either the appellant accept the sum as rental which was what it was intended for or return it but the appellant refused to do either and in his letter dated 14 July 1989 to the respondent had contended that the sum was paid into their client's account based on specific instructions of the plaintiff and the issue of the said receipt as payment for mesne profits was also upon the said instructions.

The then s. 100(1) of the LPA provides that it shall be the function of the DC to conduct a formal inquiry into the complaint or information touching upon the conduct of an advocate and solicitor in his professional capacity with respect to which the DC has been appointed. They had done so and at the end of the day found that the appellant "has by appropriating the sum of $520 for a purpose other than that it has been tendered for has committed a breach unbecoming of a solicitor but such breach not deriving out of dishonesty does not warrant serious convictions".

The then s. 101 of the LPA which dealt with the power of the Disciplinary Committee read:

> (1) A Disciplinary Committee may make such order as it thinks fair and reasonable, including:
>
> (a) ... ;
>
> (b) ... ;
>
> (c) ... ;
>
> (d) censuring the advocate and solicitor;
>
> (e) ... .

In the instant case, the DC ordered that

> (a) the appellant be censured;
>
> (b) there be no order as to costs.

Thus the only issue before this court is whether the DC was right in arriving at their decision, based upon the undisputed facts discussed above, that the appellant committed "a breach unbecoming of a solicitor". The DC has not explained what they meant by the words "has committed a breach unbecoming of a solicitor", but be that as it may, looking upon the matter as a whole, we would think that those words denote that they were of the view that failure to issue a receipt for the purpose a sum of money was tendered as is conduct unbefitting a solicitor.

We would also think that at this stage the merits of the suit pending in the Sessions Court is of no relevance. Whether the appellant was legally entitled to treat the sum paid as mesne profits has no bearing upon the matter before us. What is important is that the respondent intimated in their letter that they were tendering the rental due for the months of April and May 1989. That being so, can the appellant in his capacity as solicitor for the plaintiff say that he, upon instructions, is receiving the said sum as mesne profits and not as rental? We do not think so. Mense profits are in the nature of damages for the tort of trespass and the plaintiff would on the surface of it be entitled to sue for mesne profits. But the matter was then still pending in court. The sum of RM520 was clearly intimated as tendered for payment of two months rental for the said premises which was the subject matter of the dispute. The respondent was acting upon the instructions of the defendant when he forwarded the said cheque. It would be reasonable for the respondent to expect a receipt for rental paid and simultaneously it would be in order and be expected of the appellant to issue a receipt for rental paid if he wants to retain the sum paid. To us, to treat the payment unilaterally as mesne profits and issuing a receipt for the same cannot amount to fair conduct in relation to another solicitor.

The appellant had stressed that he was merely acting upon his client's instructions when he issued the receipt for mesne profits. With respect, we cannot see how this stand can assist him under the circumstances. If we understand him correctly, he is insisting that he had merely acted upon his client's instructions in the reasonable belief that they were correct. To us, the problem if at all it was on his client's instructions did not involve any special difficulty. He cannot "escape liability" merely on the ground that it was done upon client's instructions as we cannot see how a solicitor upon receipt of monies from another solicitor for a specific purpose can upon receiving client's instruction issue a receipt for another purpose.

What would the issuance of a receipt denote, or in other words, what is a receipt? In *Jowitt's Dictionary of English Law* (Vol. 2) the word "receipt" is stated as "an acknowledgment in writing of having received a sum of money, which is *prima facie* but not conclusive evidence of payment (*Skaife v. Jackson* [1824] 3 B&C 421)." The *Concise Oxford Dicitonary* (9th Edn) states that the word "receipt" means "1. the act or an instance of receiving or being received into one's possession. 2. a written acknowledgment of this, esp. of the payment of money. 3. an amount of money etc. received.".

Thus a receipt is simply a written acknowledgment of a sum of money. The said sum of $520 was payment tendered for rentals due and not for mesne profits. We would think that it would be the appellant's duty to explain adequately to the client the purpose that the money was paid. Has he shown that he fully explained the position to his client and is nevertheless instructed to proceed? There is nothing to show that he had done so and to justify his action is issuing such a receipt he has referred to s. 28(4) of the Civil Law Act 1956 and the views of the learned writer of the book referred to above. We cannot see how that provision of that Act can assist him at this stage. As discussed earlier, mesne profits are in the nature of damages for the tort of trespass and the issue as to whether the plaintiff is entitled to such damages has yet to be determined by the court when the receipt was issued.

On the whole we are of the view that the appellant, by appropriating the said sum as mesne profits and issuing a receipt for the same when it was tendered as payment for rental and his subsequent refusal to remedy the situation was tantamount to conduct unbefitting a solicitor. An advocate and solicitor is under a professional obligation to observe the standard of conduct required of members of his profession. In *Keith Sellar v. Lee Kwang, Tennakoon v. Lee Kwang* [1980] 2 MLJ 191 Hashim Yeop A Sani J (as he then was) in delivering the judgment of the Federal Court said (at p. 194):

> In *Au Kong Weng v. Bar Committee State of Pahang* [1980] 2 MLJ 89 it was also clearly held that there were no closed categories of professional misconduct.

In the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974 the following appears:

> One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

> We feel bound to reiterate here that the legal profession is an honourable profession whose members are expected to conduct themselves honourably. The appellants here were dealt with in a proceeding by virtue of a statute enacted to govern the conduct of members of their profession. Moreover, they were tried by their own peers. Members of the Disciplinary Committee were senior members of the profession who made firm findings of fact and they concluded that the appellants were guilty of misconduct in their practice as advocates and solicitors. The chief justice stated in *Au Kong Weng's* case that statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinions demands of its own profession."

We would admit that the facts of the above case are not similar to the instant case but the *dicta* in that case reproduced above would similarly be applicable to the instant case. The DC has found that the appellant committed "a breach unbecoming of a solicitor" and based upon the evidence before us, we see no reason to interfere with that finding. We also see no reason to interfere with the order that the appellant be censured.